89-422

No. _____

Supreme Court, U.S.
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CLERK

In The

Supreme Court of the United States

October Term, 1989

SANDRA WILLIAMS,

Petitioner,

vs.

JOHN HEALEY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeals for the Second Circuit err when it imposed a drastic seventy-five percent reduction of attorney's fees requested by a prevailing civil rights appellee without comment or explanation?

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No. _____

In The

Supreme Court of the United States

October Term, 1989

SANDRA WILLIAMS,

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vs.

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Sandra Williams, Petitioner, requests that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit entered April 28, 1989, on which a Petition for Rehearing was denied by a panel of the Court of Appeals on June 12, 1989 and a suggestion for rehearing *en banc* contained therein was unsuccessful.

ORDER BELOW

The order of the Court of Appeals for the Second Circuit is a margin order dated April 28, 1989. (Hon. William H. Timbers, Thomas J. Meskill, Jon O. Newman U.S.C.J.J.). It is reproduced in the Appendix to this Petition at App. p. 1. A timely petition for rehearing with a suggestion for rehearing by the members of the court convened *en banc* was denied on June 12, 1989, and that order is reproduced in the Appendix to this Petition beginning at App. p. 2.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1988 of Title 42 of the United States Code provides that in federal civil rights actions or proceedings, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

STATEMENT OF THE CASE

The Petitioner, Sandra Williams, brought suit against the Respondent, John Healey, pursuant to 42 U.S.C. § 1983. She alleged that the Respondent, a police officer for the City of New Haven, Connecticut, discriminated

against her on account of her race and falsely arrested her thus depriving her of rights guaranteed to her by the Fourth and Fourteenth Amendments to the United States Constitution. Suit was brought in the United States District Court for the District of Connecticut. This cause went to trial before a jury with the Hon. Warren W. Eginton, U.S.D.J., presiding.

The jury returned a verdict in favor of the plaintiff, the Petitioner herein, and against the defendant and awarded her $1,000 in compensatory damages and $3,000 in punitive damages. The District Court entered judgment accordingly. That judgment is reproduced in the Appendix to this Petition at App. p. 4.

After the entry of judgment, Petitioner moved the District Court for an award of attorneys' fees and costs pursuant to 42 U.S.C. § 1988 and requested the Court to grant counsel $125 per hour as a reasonable attorneys' fee given the background, experience and other qualifications of trial counsel. The District Court granted plaintiff's counsel's application in full and awarded the requested "lodestar". The district court did, however, later modify its award by $80 at the request of defendant's counsel. With that minor modification, the District Court finally awarded the Petitioner herein the sum of $9,775.50. That award is reproduced at App. pp. 5-6.

The Respondent herein thereafter brought a timely appeal to the United States Court of Appeals for the Second Circuit and raised several issues on review. Counsel for the parties appeared in New York City for a pre-argument conference in accordance with the rules of the Second Circuit, submitted briefs and thereafter appeared

for oral argument before the Court. The Court of Appeals thereafter rejected all claims on appeal and affirmed the judgment of the district court below in all respects. That decision is reproduced beginning at App. p. 9. As the prevailing party on appeal, the Petitioner thereafter filed an application with the Court of Appeals for an award of attorney's fees and costs pursuant to 42 U.S.C. § 1988 and under the standards announced by this Court.

Along with the application, counsel for the prevailing party submitted a memorandum of law, an affidavit of counsel setting forth her qualifications, experience and a thorough and detailed description of all work performed and hours expended in her successful defense of this appeal. In addition, in accordance with the stated requirement of this Court and by its decisions and those of the Court of Appeals below, Petitioner's counsel included in the application detailed, accurate and contemporaneously prepared time records for all time expended. The Petitioner sought $11,400 for attorney fees and $116.61 as reimbursement for other costs. Petitioner's counsel requested an hourly rate of $125 which was the same hourly rate requested and granted by the District Court below. The bulk of the services performed and the vast majority of the hours expended were attributable to trial counsel with some 11 hours expended by a partner of the firm.

By a margin order dated April 28, 1989, the Court of Appeals ordered that the "[p]laintiff-appellee shall recover attorney fees of $3,000 (three thousand dollars), plus costs of $116.61 (one hundred sixteen and sixty-one cents) from the appellant." The court made no further

comment and gave no explanation for the denial of nearly 75% of the requested fees.

Sandra Williams thereafter petitioned the Court of Appeals for a rehearing of this matter on the grounds that the Court, by its order, violated clearly established law in ordering a wholesale reduction of the requested attorney fees without comment or explanation or even an indication of a reasoned review. The Petition for rehearing contained a suggestion that the matter be considered on rehearing by all the judges of the Court of Appeals convened *en banc*. In said petition, it was noted to the Court that the Respondent, by his opposition to the Application, did not contend with the requested hourly rate for trial counsel in her defense of the appeal nor with the majority of the documented hours expended.

On June 12, 1989, the petition for rehearing was denied and the suggestion for rehearing *en banc* met with no response. App. p. 2.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Directly Conflicts With Prior Holdings Of This Court.

In *Hensley v. Eckerhart*, 461 U.S. 457, 103 S.Ct. 1933 (1983), and in numerous subsequent decisions, this Court has reaffirmed the general standards to be employed by courts in reviewing and deciding attorney fee awards pursuant to 42 U.S.C. § 1988 and other fee shifting provisions. In *Hensley*, this Court stated that a prevailing party

in a civil rights action should ordinarily recover attorney's fees "unless special circumstances would render such an award unjust." 461 U.S. at 429, 103 S.Ct. at 1937. Again, in *Blum v. Stenson*, 465 U.S. 886, 104 S.Ct. 1541 (1984), this Court approved the established "lodestar" approach – the multiplication of the number of hours reasonably expended on litigation by a reasonable hourly rate – with appropriate guidance by notice of prevailing rates in the community for similar work performed by attorneys of comparable standing and skill. 465 U.S. at 895 n.11, 104 S.Ct. 1547 n.11.

While this Court has often noted the "discretionary" nature of fee determinations, it has clearly indicated that such discretion is circumscribed by the considerations identified and guidelines imposed by this Court. *Hensley, supra*, at 437, 103 S.Ct. at 1933. Over six years ago, this Court declared it essential that a District Court "provide a concise but clear explanation of its reasons for [a] fee award". *Id.* at 437, 103 S.Ct. at 1941. No authority from this Court excuses the failure or refusal of a Court of Appeals to do the same in its decision on the application of a prevailing appellate party. Certainly, the sound reasoning underlying this Court's instruction does not lose force at the appellate level of the federal courts.

In this case, there is no question that the Petitioner complied with stated requirements of the Court by submitting detailed, accurate and contemporaneously prepared time records with adequate descriptions of services performed. It is not here necessary to detail the various considerations this Court has repeatedly identified for use by reviewing courts in granting enhancements or

imposing reductions in the process of determining a "reasonable" fee under § 1988 upon such a submission. Rather, this case presents a situation where the deciding court in one terse phrase ordered a wholesale reduction in the requested award without so much as a rudimentary explanation or comment. This is a far cry from the desired "commendable effort to explain the fee award." *Hensley, supra,* at 438, 103 S.Ct. at 1942.

Indeed the Second Circuit has before recognized the requirement of a reasoned review of and an *articulated* basis for a fee award. *See, e.g., Wells v. Bowen,* 855 F.2d 37, 43 (2d Cir. 1988) (District Court did not engage in any independent analysis of what would constitute a "reasonable" fee award); *Cohen v. West Haven Board of Police Commissioners,* 638 F.2d 496, 505 (2d Cir. 1980) (if court reduces lodestar figure, it must state its reasons for doing so).

Thus, the Court of Appeals in the instant case has treated a civil rights fee application in a manner which it would not tolerate at the District Court level.

Other Circuit Courts of Appeals have acknowledged and adhered to the "concise but clear" explanation requirement of *Hensley* and its progeny. *See, e.g., Cunningham v. County of Los Angeles,* 869 F.2d 427, 431 (9th Cir. 1988)(although elaborate mathematical equations are unnecessary courts "must provide sufficient insight into their exercises of discretion"); *Norman v. Housing Authority of City of Montgomery,* 836 F.2d 1292, 1304 (11th Cir. 1988)(Court must engage in meaningful review, articulate its decision and give principled reasons for disallowance of claimed hours). *See also Copper Liquor, Inc. v. Aldoph*

Coors Co., 684 F.2d 1087, 1101-1102 (5th Cir. 1982); *Environmental Defense Fund v. EPA*, 672 F.2d 42 (D.C.Cir.1982). As the Ninth Circuit has noted, "detailed calculations may not be necessary," but "something more than a bald, unsupported amount is necessary". *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1211 (9th Cir. 1986).

Clearly, what is here presented is a "bald, unsupported amount" without a shred more to aid anyone in an understanding of this award. It not only fails to answer the question of what is "reasonable", it is, by its very nature, unreasonable. Since the order below flies directly in the face of prior holdings of this Court, a writ should issue.

2. The Decision Below, Which Effectively Vitiated the Petitioner's Judgment, Undermines the Very Purpose of the Civil Rights Fee Act and Such Practice, If Allowed to Continue, Threatens the Ability of Civil Rights Plaintiffs to Secure Willing and Competent Counsel.

There exist additional and compelling public policy reasons for granting the Writ. Time and again, this Court has discussed and affirmed the Congressional intent of 42 U.S.C. § 1988: to ensure "effective access to the judicial process for persons with civil rights grievances." *Hensley, supra*, at 429, 103 S.Ct. at 1937 *citing* H.R.Rep. No. 94-1558, p.1 (1976). As the concurring justices in *Hensley* noted:

> In many cases arising under our civil rights laws the citizen who must sue to enforce the law has little or no money to hire a lawyer. If private citizens are to be able to assert their civil rights,

> and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must recover what it costs them to vindicate these rights in Court.

Id. at 445, 103 S.Ct. at 1945 *citing* S.Rep. No. 94-1011, p.2 (1976).

Thus, "no fee is reasonable unless it would be adequate to induce other attorneys to represent similarly situated clients seeking relief comparable to that obtained in the case at hand. *Id.* at 449, 103 S.Ct. at 1948; *see also Pennsylvania v. Delaware Valley Citizens' Council*, 478 U.S. 546, 565, 106 S.Ct. 3088, 3098 (1986)(same).

The petitioner herein was the victim of a false arrest; the jury, indeed, found the defendant's behavior to warrant the imposition of punitive damages in addition to a grant of compensatory damages. While it is true that the total judgment was a modest $4000, this is often the case in actions involving a deprivation of constitutional rights without significant special damages and in the absence of additional physical injury.

"Civil rights claims of small cash value nevertheless have . . . social value . . . " *Ustrak v. Fairman*, 851 F.2d 983, 989 (7th Cir. 1988). The Petitioner's achievement is the desire of all civil rights grievants with meritorious claims – a vindication of the rights one holds as a citizen of this Nation. This is so because the vindication for Sandra Williams "is a deterrent to future violations, to the benefit not only of [Williams], but of others in similar situations." *Id. citing Aubin v. Fudala*, 782 F.2d 287, 291 (1st Cir. 1986).

Ms. Williams did not bring the appeal; the losing defendant did. She of course needed counsel to defend

her judgment. She prevailed on every one of the issues on review brought to the Second Circuit, which found all of the defendant's claims to be wholly without merit. Yet, with the drastic reduction of requested fees to the Petitioner for the successful defense of her judgment, the Court of Appeals has handed her only a Pyrrhic victory.

Counsel of record on appeal recorded and requested compensation for a total of 70.4 hours expended in connection with all aspects of the appeal. The requested hourly rate of $125 was the same rate determined by the District Court below to constitute a market-based, reasonable fee. With an additional thirteen hours expended and recorded by one of the law firm's partners, the total amount of attorney's fees incurred by the Petitioner was $11,400. By its margin order of the round sum of $3000, the Court of Appeals engaged in a "bobtail procedure" with the "figure seemingly picked out of thin air".[1]

By its unexplained wholesale denial of the Petitioner's request, the Court of Appeals has, in effect, totally vitiated the judgment in her favor. Worse yet, the Petitioner is indeed placed in a position worse than that she held prior to bringing the action in the first place. The defendant not only succeeded in making Williams pay for her own judgment, but he also caused her to actually incur debt for prevailing in a civil rights case. The only alternative is for appellate counsel to forego the bulk of compensation for hours worked that could easily have been expended on behalf of other more financially able

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[1] 2 M. Derfner and A. Wolf, *COURT AWARDED ATTORNEY FEES* ¶ 18.05 at pp.18-51, 52 nn. 37, 42 (1988) (citations omitted).

clients. The placement of counsel in such a dilemma is the precise roadblock to civil rights vindication that Congress and this Court have expressly sought to eliminate.

Wholesale elimination of reasonable appellate fees removes the incentive for counsel to take and litigate cases which do not carry promise of large monetary award, but which instead now carry the risk of total vitiation of any recovery by the simple defense tactic of meritless appeal to the Second Circuit. With these important considerations at hand, it stands as reason that the Court of Appeals should be made to discharge the same obligation that it imposes on the District Courts below.

CONCLUSION

For all of the above reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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(203) 562-9931

SEPTEMBER 11, 1989

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WILLIAMS	)	Docket No. 88-7927
VS.	)	**NOTICE OF MOTION**
HEALEY	)	for *APPLICATION FOR AWARD OF ATTORNEYS' FEES AND COSTS*

O R D E R

IT IS HEREBY ORDERED that the motion be and it hereby is granted.

Plaintiff-appellee shall recover attorneys' fees of $3,000 (three thousand dollars), plus costs of $116.61 (one hundred sixteen dollars and sixty-one cents) from the appellant.

/s/ _____
Williams H. Timbers, U.S.C.J.

/s/ _____
Thomas J. Meskill, U.S.C.J.

/s/ _____
Jon O. Newman, U.S.C.J.
(by TJM)

DATED: April 28, 1989

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 12th day of June, one thousand nine hundred and eighty-nine.

SANDRA WILLIAMS,

PLAINTIFF-APPELLEE,

V.

JOHN HEALEY,

DEFENDANT-APPELLANT

DOCKET NUMBER

88-7927

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by plaintiff-appellee Sandra Williams.

Upon consideration by the panel that heard the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard

the appeal and that no such judge has requested that a vote be taken thereon.

/S/ _____
ELAINE B. GOLDSMITH
Clerk

DATED/FILED: June 12, 1989

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

SANDARA WILLIAMS

v.

JOHN HEALEY, Individually and in his Official Capacity as an Officer In the Police Department of New Haven Connecticut.

CIVIL NO. N-87-113 (WWE)

JUDGMENT

This action came on for trial before the Court and a jury, the Honorable Warren W. Eginton, United States District Judge, presiding, and the issues having been duly tried and the jury having rendered its verdict.

It is ORDERED and ADJUDGED that judgment be, and hereby is, entered for the plaintiff as against the defendant John Healey in the amount of $1,000.00 in compensatory damages and in the amount of $3,000.00 in punitive damages.

Dated at Bridgeport, Connecticut this 29th day of September, 1988.

KEVIN R. ROWE, Clerk

By /s/ _____

Carol E. Cannady
Deputy in Charge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

SANDRA WILLIAMS	:	
VS.	:	CIVIL NO. N-87-113 (WWE)
JOHN HEALEY	:	NOVEMBER 2, 1988

APPLICATION FOR AWARD OF ATTORNEYS' FEES AND COSTS

Pursuant to 42 U.S.C. § 1988 and 42 U.S.C. § 1983, plaintiff's counsel, as counsel for the prevailing party, hereby moves this Court to determine reasonable attorneys' fees and costs to be paid by the defendant in this action. Such an award is to be made for the following reasons:

1. The plaintiff filed an action pursuant to 42 U.S.C. §§ 1983 and 1988 complaining that she had been falsely arrested by the defendant.

2. The jury was selected on August 29, 1988, and the trial began on September 26, 1988. On September 28, 1988, the jury rendered the verdict in favor of the plaintiff and against the defendant John Healey.

3. The jury awarded the plaintiff compensatory damages in the amount of $1,000.00 and further awarded the plaintiff punitive damages in the amount of $3,000.00.

4. The adjudication that the plaintiff's civil rights had been violated, together with the award of damages includ- [sic]

ORDER: *September 5, 1988*: Absent timely objection, the request for attorney's fees and costs is GRANTED. The plaintiff is hereby awarded $9,855.50 in attorney's

fees and costs. This sum represents the following: for Attorney John Williams, 3.8 hours at $175.00 per hour; for Attorney Jeffrey Drewniany, 1.5 hours at $125.00 per hour; and for Attorney Karen Torre, 70.4 hours at $125.00 per hour. This sum also includes costs and fees of $203.00.

/s/ _____
WARREN W. EGINTON, U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

SANDRA WILLIAMS	:	
PLAINTIFF	:	
VS.	:	CIVIL ACTION NO. N-87-113 (WWE)
JOHN HEALEY	:	
DEFENDANT	:	DECEMBER 9, 1988

MOTION FOR RECONSIDERATION CONCERNING DEFENDANT'S APPLICATION FOR ATTORNEYS' FEES AND COSTS

ORDER:

January 5, 1989: Upon reconsideration, the request for attorney's fees and costs is GRANTED with the following modification: The plaintiff is awarded $9,775.50 in attorney's fees and costs. This figure reflects a reduction of costs from $203.00 to $123.00. *See* Defendant's Motion for Reconsideration (filed Dec. 9, 1988) at 3. The Court finds that the lodestar amount previously computed reflects a number of hours reasonably spent on the case at reasonable hourly rates. *See DiFilippo v. Morizio*, 759 F.2d 231, 234 (2d Circuit 1985). The Court rejects the defendant's suggestion that plaintiff has only partially prevailed because the Court declined her proposed First Amendment charge. Here, both of plaintiff's theories for relief were based upon one overall "common core of facts,"

thus making a reduction of fees unnecessary. *See Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983).

/s/ _____
WARREN W. EGINTON, U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Fifteenth day of March, one thousand nine hundred and eighty-nine.

Present:
HONORABLE WILLIAM H. TIMBERS,
HONORABLE THOMAS J. MESKILL,
HONORABLE JON O. NEWMAN,
Circuit Judges.

SANDRA WILLIAMS, *PLAINTIFF-APPELLEE,* V. JOHN HEALEY, Individually and in his Official Capacity as an Officer in the Police Department of New Haven, Connecticut, *DEFENDANT-APPELLANT*	Docket No. 88-7927 Filed: 3/15/89

This is an appeal from a jury verdict entered in the United States District Court for the District of Connecticut, Eginton, *J.*, finding appellant Healey liable for compensatory and punitive damages under 42 U.S.C. § 1983.

This cause came on to be heard on the transcript of record from said district court and was argued by counsel.

The judgment of the District Court is AFFIRMED.

ISSUED AS MANDATE: 4-7-89

Appellee Williams filed suit against Police Officer Healey alleging that he had violated her constitutional rights by arresting her without probable cause. After a jury verdict was returned in Williams' favor, Healey appealed. He argues that the District Court judge improperly instructed the jury in several ways. His primary contention is that the instructions erroneously stated that the violation of Conn. Gen. Stat. Ann. § 53a-182, Disorderly Conduct, must take place in public. He also alleges, *inter alia*, that the judge should not have included a passage from an opinion of the Appellate Session of the Connecticut Superior Court in the jury instructions.

We find Healey's contentions to be without merit. The inclusion in the charge of two examples, one of which involved an incident in a public place for which the judge said probable cause to arrest for disorderly conduct might have been present, and one of which was set in a private place for which the judge said probable cause might not have been present, did not render the charge unduly prejudicial. Taken as a whole, *see Peolillo v. Dresser Industries, Inc.*, 865 F.2d 37, 40 (2d Cir. 1989), the charge adequately and accurately instructed the jury on the elements of disorderly conduct.

Nor was it incorrect for the District Court to refuse to charge the jury that the lobby of a hotel is a public place. Whether a place is public under either the breach of the peace or the disorderly conduct statute is a question of fact for the jury to decide. *See State v. Duhan*, 194 Conn. 247, 359-60 (1984)(whether "all the relevant circumstances

of time and place and complainant" added up to "unreasonable noise" within the meaning of the disorderly conduct statute was a question for jury). The Connecticut statutes explicitly state that "public" is not defined because its interpretation should be worked out on a "case by case basis." Conn. Gen. Stat. Ann. Title 53a, Pt. XIV Commission Comment - 1971.

Finally, it was not error for the Court to use a part of the opinion in *State v. Nelson*, 38 Conn. Supp. 349 (App. Sess. Super. Ct. 1982), in its charge. The portion of the charge that came from *Nelson* was not unduly complicated or confusing, and is not grounds for reversal. The instructions, taken as a whole, were readily understandable.

We have considered appellant Healey's other contentions and find them to be without merit.

/s/ _____
William H. Timbers, U.S.C.J.

/s/ _____
Thomas J. Meskill, U.S.C.J.

/s/ _____
Jon O. Newman, U.S.C.J.

SUPREME COURT, U.S.
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vs.

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On Petition For A Writ of Certiorari To The United States Court of Appeals For The Second Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeals for the Second Circuit err when it imposed a drastic seventy-five percent reduction of attorney's fees requested by a prevailing civil rights appellee without comment or explanation?

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No. 89-422

In The

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October Term, 1989

SANDRA WILLIAMS,

Petitioner,

vs.

JOHN HEALEY,

Respondent.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Second Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ORDER BELOW

The petition challenges an order of the Court of Appeals for the Second Circuit, *i.e.*, a margin order dated April 28, 1989. (Hon. William H. Timers, Thomas J. Meskill, Jon O. Newman U.S.C.J.J.). A timely petition for rehearing with a suggestion for rehearing by the members of the court convened *en banc* was denied on June 12, 1989.

JURISDICTION

The jurisdiction of this Court is invoked by Petitioner pursuant to 28 U.S.C. Sec. 1254(1). Respondent denies that jurisdiction lies.

STATUTORY PROVISION INVOLVED

Petitioner relies on Section 1988 of Title 42 of the United States Code, which provides that in federal civil rights actions or proceedings, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

COUNTER STATEMENT OF THE CASE

A jury verdict for violation of civil rights (false arrest) was rendered in favor of Petitioner Sandra Williams, the Plaintiff-Appellee below, awarding her $1,000 compensatory damages and $3,000 punitive damages.

Subsequently, the trial judge awarded an additional $9,855.50 in attorney fees and costs, of which $203.00 represented costs. The defense moved for Reconsideration. After a period of time the trial Court reduced the award to $9,775.50, representing a reduction of $80.00 in costs.

An appeal from the jury's verdict was subsequently taken, with a decision in favor of Ms. Williams.

Counsel for Ms. Williams sought an additional $11,400.00 in attorney fees, plus $116.61 in costs, for the

appeal. The application claimed 70.4 hours of work for Attorney Karen Lee Torre at $125.00 per hour ($8,800.00), and 13 hours of work for Attorney Sue L. Wise at $200.00 per hour ($2,600.00).

The Respondent John Healey, Defendant-Appellant below, filed a timely Opposition to both amounts. The Court of Appeals, by margin order, awarded the full $116.61 costs but awarded only $3,000.00 attorney fees.

Petitioner then filed a Petition for Rehearing and a Suggestion of En Banc Hearing which was denied without any request for a vote on the suggestion of en banc hearing.

REASONS FOR DENYING THE WRIT

1. The Writ should be denied because the petition presents no issue appropriate for review by this Court.

The petition is nothing more than dissatisfaction with the discretion exercised by the Second Circuit in arriving at the amount to be awarded and the fact that the Second Circuit did not write a full articulation of its reasons.

In 1972 this Court disposed of a similar claim in *Taylor, et al vs. McKeithen, et al*, 407 U.S. 191, 92 S.Ct. 1980, 32 L.Ed.2d 648 (1972). There the Court expressly recognized "that the courts of appeals should have wide latitude in their decisions of *whether* or how to write opinions," *Id.*, at 194-5 n. 4, 92 S.Ct. at 1982 n. 4 (emphasis added), even with respect to decisions on the merits of an appeal.

Instead, the Court in *Taylor* recognized the necessity of a remand to a court of appeals for greater articulation only in a very limited situation not present in this case, *i.e.*, in the "special circumstances [of a complex case where the Court is] loath to impute to the Court of Appeals reasoning that would raise a substantial federal question [on the merits of the appeal] when it is plausible that its actual ground of decision was of more limited importance." *Id.*, at 194-5 n. 4, 92 S.Ct. at 1982 n. 4 (bracketed portions added).[1]

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[1] The Petitioner relies only on cases requiring written findings when decisions are rendered by the District Courts. The District Courts are subject to more stringent requirements of articulation by Federal Rule of Civil Procedure 52(a), reprinted at Appendix A1, which is intended to assist the Courts of

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See Rules of the Second Circuit Court of Appeals, Part I, Sec. 0.23., reprinted at Appendix A2.

In the instant case there is no relevant division of opinion among the Circuit Courts of Appeal. There is no unique or substantial issue of constitutional or federal law presented. There is no mandatory requirement that the Circuit Court provide a written, detailed opinion in every instance in which it rules on either the merits of an appeal or an application for attorney fees and costs.

In sum, no issue posed in the petition merits the devotion of this Court's limited resources.

2. The Writ should be denied because the record fully supports the discretionary action of the U.S. Court of Appeals for the Second Circuit in reducing the amount of attorney fees claimed by the petitioner.

Summary. We itemized for the Second Circuit (i) nearly 25 hours of claims by Attorney Torre which we felt should be compensated at less than her full hourly rate because the worked performed was routine and did not

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Appeal in effectively exercising their somewhat broader scope of review. *Lemelson vs. Kellogg Co.*, 440 F.2d 986 (2d Cir. 1971).

In fact, it is Respondent who had a potential claim in the Court of Appeals because of the trial judge's reliance on a mere margin order in granting his award of attorney fees and costs. In other words, the Petitioner's attorneys received a windfall in the trial court.

Petitioner apparently does not see anything wrong with the fact that the trial judge's award was by a simple, conclusory margin order.

require any particular skill, (ii) more than 30 hours of claims by Attorney Torre which we felt were wholly unjustified, and (iii) 13 hours of claims by Attorney Wise which we felt were also unjustified.

Clearly, the Second Circuit agreed with our detailed analysis.

(i) Petitioner ignored prior decisions limiting the amount of attorney fees to be awarded for routine work or work not requiring particular expertise.

We do not agree that all hours claimed for work (routine or otherwise) were justified. We discuss such total claims *infra*.

However, to the extent such hours were justified the Second Circuit Court of Appeals has held (without challenge by the petitioner in this case) that work devoted to routine matters or matters which do not require particular expertise should be compensated at lower rates than those appropriate for trial and other work requiring greater skill.[2]

Those authorities were pointed out to Petitioner's attorneys in our Motion for Reconsideration of the attorney fees awarded by the trial court, and at least one of those precedents involved the law firm representing the petitioner.

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[2] *Cohen vs. West Haven Board of Police Commissioners*, 638 F.2d 496, 505 (2d Cir. 1980); also *Guarino vs. Amato*, Civil No. N-83-99 (Meskill, Circuit Judge, sitting by designation) (D. Conn. 1987) (copy attached to our April 26, 1989, Opposition to Application for Attorney Fees and Costs, in the U. S. Court of Appeals for the Second Circuit).

Nevertheless, Petitioner's Attorney Karen Lee Torre claimed her full hourly rate of $125.00 per hour for nearly 25 hours of work (quoted hereinafter) which we believe is fairly characterized as routine or not requiring particular expertise work.

> Call to client Re: Appeal; letter to client
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> Prep. & travel to New York . . .
>
> Call from client re: appeal; letter to client; call to clerk's office
>
> Call from appellant's counsel re: stipulation on appendix; visit from staff member of N.H. corp. counsel for signature on stipulation
>
> Three telephone calls to Clerk's office – Ct. of Appeals; . . . binding of copies of brief after final revisions to brief; delivery of brief to JRW for filing; call from appellant's counsel Re: production of deferred appendix
>
> Scheduling/file review; letter to Appellant's counsel
>
> Call from 2d Circuit office; call from client; call to client; call to appellant counsel; redictation of page proof brief in final form *c* joint app. citations
>
> Review/proof of appellee brief in final form; conference with secretary; call to printer; call to 2d Circuit; prep. of certification/signature; check of 10 copies plus original – call to Federal Express for delivery
>
> Calls to 2d Circuit
>
> Calls re: hotel reservations; call to 2d Circuit re: confirmation of appearance time & panel; prep. and travel from Stony Creek, CT to New York City; . . .

. . . travel back to hotel and travel return to Stony Creek, CT

The Second Circuit – in its discretion – obviously agreed with our analysis.

(ii) Petitioner ignored the many precedents, including four cases involving the law firm representing the petitioner, rejecting her theory that an attorney's alleged "billing rate" is the measure of reasonable attorney fees.

Petitioner's counsel claimed that they should be compensated at their alleged "billing rates". In at least four instances where the law firm representing the instant Petitioner has made such a "billing rate" argument, the Courts have rejected the argument.[3]

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[3] *O'Neill vs. Krzeminski, et al,* U.S. Court of Appeals, Docket No. 87-7272 (Order of March 11, 1988) (copy attached as Exhibit 4 to our April 26, 1989 Opposition to Application for Attorney Fees and Costs in the Court of Appeals); *O'Neill vs. Krzeminski, et al,* Civil No. N-83-102 (WWE) (Ruling on Plaintiff's Application for Costs and Attorneys Fees, filed April 20, 1987) (copy attached as Exhibit 3 to our April 26, 1989 Opposition to Application for Attorney Fees and Costs in the Court of Appeals); *Guarino vs. Amato,* Civil Action No. N-83-99 (TJM), (Memorandum of Decision on Motion for Award of Costs and Attorney's Fees Pursuant to 42 U.S.C. Sec. 1988, filed January 26, 1987) (Circuit Judge Meskill, sitting by designation) (copy attached as Exhibit 2 to our April 26, 1989 Opposition to Application for Attorney Fees and Costs in the Court of Appeals); *Williams vs. Healey,* Civ. N-87-113 (WWE) (Order of Dec. 5, 1988, on reconsideration Jan. 5, 1989) (copies attached as Exhibits 5 and 6 to our April 26, 1989 Opposition to Application for Attorney Fees and Costs in the Court of Appeals).

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Instead, the hourly rate to be awarded is to be based on the reasonable prevailing rate in the area for similar work performed by similarly skilled attorneys. *Blum vs. Stenson*, 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984).

Under this standard petitioner offered no evidence in the District Court or the Court of Appeals to justify the $200.00 per hour sought by Attorney Wise and no evidence to support a full $125.00 per hour award for the above-listed routine work claimed by Attorney Torre. (We did not dispute in the Court of Appeals that $125.00 per hour was appropriate for specialized work by Attorney Torre.)[4]

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The foregoing are unpublished opinions. We cite them at this point in order to make clear that Petitioner's counsel was well aware of the precedents concerning their alleged "billing rate" theory yet pressed ahead with the same argument. It may well be that that too was a factor in the Second Circuit's disposition of the attorney fee claim.

[4] In the more than 100 cases this office has handled with the firm representing the petitioner over 11 years, evidence at trial is that they almost always charged a flat rate of only several hundred dollars for the related criminal case. In our experience most criminal cases which underlie such civil rights lawsuits result in "nolles" and thus no finding on the validity of the arrest.

In fact, in the December 1986 trial in *Belcha vs. DeBenedet, et al*, Civil No. N-85-212 (PCD), another attorney, formerly with the same law firm, testified under oath in the presence of this attorney and in the presence of Attorney Sue L. Wise that it was the frequent practice in that law firm to charge modest flat fees of but a few hundred dollars for such criminal work. Perhaps more affluent clients are charged hourly rates.

If attorney fee awards are allowed to be governed by the alleged "billable rates" of attorneys, the attorneys can routinely and unilaterally increase awards under 42 U.S.C. Sec. 1988 by merely increasing their alleged billing rates, regardless of the reasonableness of such rates or how rarely they actually charge someone that rate. That is exactly what Petitioner's attorneys attempted to do in this case.

(iii) The Second Circuit properly recognized that the amounts claimed by Petitioner's attorneys were excessive.

The total hours claimed by both attorneys for Petitioner was excessive. Petitioner claimed a total of 83.4 hours for the relatively simple appeal.

(a) Petitioner's counsel claimed nearly 15 hours for research although they added only four (4) cases to those cited by Respondent Healey's attorney in the initial brief on appeal.

(b) The law firm representing the Petitioner specializes in case alleging police misconduct and has filed hundreds in the State of Connecticut.

(c) The only issue on appeal concerned the accuracy of a few sentences of the instruction to the jury.

(d) The relevant law was not in dispute and the appeal concerned only the proper application of the law to the facts of the case.

(e) Petitioner claimed that the appeal was frivolous.

(f) Petitioner's counsel virtually ignored the last eight pages of Respondent Healey's initial brief on appeal.

(g) Nearly all of those last eight pages of Respondent Healey's initial brief on appeal were virtually identical to pleadings in a case previously litigated between the same two law offices.

(h) We identified more than thirty hours claimed by Attorney Torre and 13 hours claimed by Attorney Wise as unjustified (regardless of the amount of compensation that might have been appropriate if the time claimed had been justified).

(i) Petitioner's attorney had claimed 1.6 hours for additional research to respond to our Reply Brief on appeal, even though our Reply Brief cited no additional cases, offered no new arguments, and simply reprised portions of our initial appeal Brief in order to respond to specific arguments in the Appellee's Brief.

(j) Petitioner's counsel had claimed that substantial additional time was needed because we used a Deferred Joint Appendix. However, they had stipulated to use of the Deferred Joint Appendix, and all that required was substituting the page numbers of the Deferred Joint Appendix in the final copy of their appeal Brief.

All of the foregoing matters were brought to the attention of the Second Circuit and documented with appropriate exhibits to our April 26, 1989 Opposition to Application for Attorney Fees and Costs.

The Second Circuit – in its discretion – agreed that the Petitioner's counsel overstated their claims.

The total amount of time claimed by one of Petitioner's attorneys was also unjustifiably duplicative.

Attorney Sue L. Wise claimed she had necessarily expended 13.0 hours of work, in addition to the 70.4 hours claimed by Attorney Torre. Attorney Wise demanded $2,600.00, at $200.00 per hour, in addition to the fees demanded by Attorney Torre.

Attorney Sue L. Wise claimed the following amounts of time.

DATE	DESCRIPTION	HOURS
1-14-89	Research (West Law)	5.
1-17-89	Recast of brief	6.
1-18-89	Final proof of brief	2.
Total Time		13. Hours

Attorney Wise's claim of 5 hours West Law Research is in addition to the nearly 10 hours research claimed by Attorney Torre. The result of those fifteen (15) hours of purported research was only four (4) very basic cases in addition to the cases cited in the Respondent Healey's initial Brief on appeal.

Attorney Wise claimed that she needed to devote another 8 hours to recasting and proofing their Brief, in addition to the many hours devoted by Attorney Torre.

While prevailing parties are not barred as a matter of law from receiving fees and costs for a second attorney in the case, "the scope and complexity of the particular litigation" must justify the duplication of attorney fees and related costs as being "reasonably needed to prevail in the litigation."[5]

In this case, the appeal was relatively simple,[6] little research was required, claimant Attorney Karen Lee Torre personally handled the trial, and the Affidavit of Attorney Karen Lee Torre indicated that she is an experienced and skilled attorney.

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[5] *New York State Association for Retarded Children, et al vs. Carey, et al,* 711 F.2d 1136, 1146 (2d Cir. 1983); *O'Neill vs. Krzeminski, et al,* Civil No. N-83-102 (WWE) (Ruling on Plaintiff's Application for Costs and Attorney Fees, filed April 20, 1987) (D. Conn.) (copy attached as Exhibit 3 to our April 26, 1989 Opposition to Application for Attorney Fees and Costs in the Court of Appeals).

[6] Contrast facts in: *New York State Association for Retarded Children, et al vs. Carey, et al, supra,* 711 F.3d 1136, 1139, 1142, 1146 (2d Cir 1983) (substantial nearly one-third reduction in claimed hours despite complex class action litigation, involving "complex legal issues," resulting in a comprehensive decree which provided "Steps, Standards and Procedure" for improving conditions at a state institution for the retarded; followed by "elaborate subsequent proceedings challenging compliance with the decree"); *Ross vs. Sattmarsh,* 521 F.Supp. 753 (S.D.N.Y. 1981) (complex class action litigation resulting in a comprehensive plan for implementing procedural safeguards in city school district's disciplinary process; extensive depositions and document discovery and review, and attrition of attorney personnel during the six year course of the proceedings).

The hourly rate claimed by one of Petitioner's attorneys was excessive.

(i) When the parties sought to resolve the issue of attorney fees amicably only $150.00 per hour was claimed on behalf of Attorney Wise. (See hand-written memorandum attached as Exhibit 1 to our April 26, 1989 Opposition to Attorney Fees and Costs.)

(ii) Even Attorney Wise's Affidavit indicated that she has never received an award in excess of $150.00 per hour. Instead, her Affidavit alleged that her "billing rate" was $150 per hour until the Fall of 1988 and since then her "billing rate" has been $200.00 per hour.

(iii) Respondent's counsel is aware of only two instances where more than $150.00 per hour has been awarded for similar work in the District of Connecticut. In both instances the awards were for only a few hours work, one award was made without apparent opposition, and the other award was made when the opposition was filed after the deadline for doing so. We disclosed both of those instances to the Second Circuit in our Opposition to Application for Attorney Fees and Costs.

CONCLUSION

For the foregoing reasons the Petition should be denied. The law firm representing the Petitioner has filed hundreds of cases alleging police misconduct in the District of Connecticut, and they have continued to do so subsequent to the Second Circuit's disposition of their attorney fee application. They do not appear to have suffered any disincentive due to the Second Circuit's ruling.

Respectfully submitted,

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OCTOBER 20, 1989

Federal Rule of Civil Procedure 52. Findings by the Court

(a) Effect

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

(b) Amendment

Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or

not the party raising the questions has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963).

Rules of the Second Circuit Court of Appeals

Part I, Sec. 0.23. Disposition in Open Court or by Summary Order

The demands of an expanding caseload require the court to be ever conscious of the need to utilize judicial time effectively. Accordingly, in those cases in which decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion, disposition will be made in open court or by summary order.

Where a decision is rendered from the bench, the court may deliver a brief oral statement, the record of which is available to counsel upon request and payment of transcription charges. Where disposition is by summary order, the court may append a brief written statement to that order. Since these statements do not constitute formal opinions of the court and are unreported and not uniformly available to all parties, they shall not be cited or otherwise used in unrelated cases before this or any other court.

(Added Oct. 31, 1973, and amended June 10, 1977.)